DIRECTOR OF PUBLIC PROSECUTIONS (COMMONWEALTH) & ANOR.

v.

MARIA KAINHOFER

HIGH COURT, AUSTRALIA
BRENNAN CJ, DAWSON, TOOHEY
MCHUGH & GUMMOW JJ
[FC 95/049]
30 NOVEMBER 1995

ADMINISTRATIVE LAW: *Judicial review - Extradition proceedings - Whether order of Magistrate committing respondent to prison amenable to judicial review - Whether Magistrate could have properly made the order - Whether respondent was "accused" of the extradition offences - Sections 3, 6, 16, 19, 22 Extradition Act 1988 - Extradition (Republic of Austria) Regulations.*

On 20 January 1993, the Republic of Austria made a request in writing for the surrender of the respondent for prosecution in Austria in respect of a number of misappropriation and malversion offences under the Austrian Penal Code. That request was an extradition request for the purposes of the Extradition Act 1988.

The respondent was arrested pursuant to a warrant issued by a Magistrate and after proceedings in which a Magistrate found that the respondent was eligible for surrender in relation to four alleged offences, she was committed to prison to await a determination by the Attorney-General whether to surrender her to the Republic of Austria in relation to those offences or to order her release. The respondent sought a review of the Magistrate's decision to commit her to prison. She failed before White J in the Supreme Court of Queensland but succeeded on appeal to the full Court of the Federal Court. The Federal Court quashed the Magistrate's order and directed the Magistrate to order the release of the respondent. The Court also held that the Magistrate's order could not properly have been made unless the Magistrate was satisfied in accordance with s. 19(2)(a) and 3(a) of the Extradition Act, that the supporting documents furnished by the Republic of Austria provided for the arrest of the respondent as a person "accused" of the offences to which the warrant referred. From the documents, the Magistrate could not have been so satisfied. On appeal to the High Court of Australia, the principal issue for determination was whether it was part of the Magistrate's function to determine whether the respondent was accused of the four alleged offences in relation to the order committing her to prison.

Held:

Per Brennan CJ, Dawson & McHugh JJ:

[1] Under s. 19(3)(a) "supporting documents" in relation to an extradition offence meant a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence or a duly authenticated copy of such a warrant, if the offence is an offence of which the person is accused.

[2] The Magistrate who conducts proceedings under s. 19(2)(a) is concerned solely with the correspondence between the supporting documents in relation to the offence produced to the Magistrate and the description of "supporting documents" in s. 19(3). The introductory words of s. 19(3)(a) and (b) merely direct the s. 19 Magistrate to the relevant description to be applied to the supporting documents in the case of the particular extraditable person. The relevant direction is obtained by the s. 19 Magistrate by reference to whatever material is produced.

[3] The only issue for the determination under s. 19(2)(a) was whether the document produced was a duly authenticated warrant or copy warrant issued by the Republic of Austria for the arrest of the respondent, for an extradition offence. That issue did not require a finding as to whether the respondent was a person "accused."

Per Toohey J:

[1] In reaching a decision as to a person's eligibility for surrender under s. 19 of the Act, a Magistrate is not required to determine whether the person is an "extradictable person" wihtin s. 6. A determination of that question only arises when, as a first step in the extradition process, a Magistrate is called upon to issue a provisional arrest warrant under s. 12 and when the Attorney-General has given notice pursuant to s. 16 that an extradition request has been received.

[2] A consequence is that there is little scope for judicial review of the question whether a person is an extraditable person. Only the Magistrate's decision under s. 19 as to eligibility for surrender is expressly reviewable under the Act. The decision to issue a provisional arrest warrant under s. 12 is not expressed to be reviewable. The scope for challenging a decision of the Magistrate under s. 19 is therefore very limited.

Per Gummow J:

[1] The clarification in s. 19(3) of that which is required for the necessary "supporting documents" assumes that extradition is sought either in respect of an offence of which the person is accused or in respect of an offence of which the person has been convicted. It does not proceed on the footing

that there is a further category of offences in respect of which a person is neither accused nor convicted. It is for the Magistrate to determine that the necessary duly authenticated documents are produced and there may be debate as to what, in a particular case, amounts to due authentication within the meaning of s. 19(7). What is not involved, or permitted, in the classification of the "supporting documents" produced to the Magistrate is an inquiry before the Magistrate as to whether the offences are offences of which the person is neither convicted nor accused.

[2] A fair reading of the materials produced indicates that the respondent is wanted for prosecution on charges including the four grounds accepted by the Magistrate. It is on that footing that, under Austrian Law, there is the necessary suspicion to found the issue of the warrant of arrest by the Salzburg State Court dated 29 September 1992. It follows that, within the meaning of s. 6 of the Act, the respondent is a person in respect of whom there is in force a warrant of arrest in relation to offences against the law of Austria which she is accused of having committed.

[Appeal allowed]

Cases referred to:
Trimbole v. Dugan [1984] 3 FCR 324 ***(refd)***
Harris v. Attorney-General [1994] 52 FCR 386 ***(refd)***
Craig v. South Australia [1995] 69 ALJR 873 ***(refd)***
Schlieske v. Federal Republic of Germany (No. 2) [1987] 76 ALR 417 ***(refd)***
Zoeller v. Republic of Germany [1989] 23 FCR 282 ***(refd)***
Todhunter v. USA [1995] 129 ALR 331 ***(refd)***
Riley v. The Commonwealth [1985] 159 CLR 1 ***(refd)***
Kainhofer v. DPP [1994] 52 FCR 341 ***(refd)***
R v. Governor of Brixton Prison [1911] 2 KB 82 ***(refd)***
Narain v. DPP ([1987] 15 FCR 411 ***(refd)***
Athanassiadis v. Govt of Greece [1971] AC 282 ***(refd)***
Wiest v. DPP [1988] 23 FCR 472 ***(refd)***
Fraser v. The Queen (No. 2) [1985] 1 NSWLR 680 ***(refd)***
Stirland v. Director of Public Prosecutions [1944] AC 315 ***(refd)***
State of Hawaii v. Almeida [1973] 509 P 2d 549 ***(refd)***
R. v. Heit [1984] 3 WWR 614 ***(refd)***
Kodellas v. Saskatchewan Human Rights Commission [1987] 2 WWR 195 ***(refd)***
Reener v. Reener [1935] 181 A 191 ***(refd)***
Ex parte Foster [1936] 61 P 2d 37 ***(refd)***
Ex parte Burnett [1943] 144 P 2d 126 ***(refd)***
Wynsma v. Leach [1975] 536 P 2d 817 ***(refd)***
In re Tivnan ([1864] 5B & S 645 [122 ER 971] ***(refd)***
Rees v. Secretary of State for the Home Department [1986] AC 937 ***(refd)***
In re Farez [1870] 8 Fed Cas 1007 ***(refd)***
In re Thomas [1874] 23 Fed Cas 927 ***(refd)***
Muller's case ([1863] 17 Fed Cas 975 ***(refd)***
The Commonwealth v. Tasmania, The Tasmanian Dam Case [1983] 158 CLR 1 ***(refd)***

Thiel v. Federal Commissioner of Taxation [1990] 171 CLR 338 ***(refd)***
In re Kaine [1852] 55 US 111 ***(refd)***
Hottentot Venus [1810] 13 East 195 [104 ER 344] ***(refd)***
Elk v. Wilkins [1884] 112 US 94 ***(refd)***
Ex parte Lo Pak [1888] 9 NSWR 221 ***(refd)***
Johnstone v. Pedler [1921] 2 AC 262 ***(refd)***
R. v. Carter; Ex parte Kisch [1934] 52 CLR 221 ***(refd)***
Re Bolton; Ex parte Beane [1987] 162 CLR 514 ***(refd)***

Legislation referred to:

Administrative Decisions (Judicial Review) Act 1977, s. 3(1), Schedule 1, para. (r)
Austrian Code of Criminal Procedure, Art. 175, s. 1(2), (4)
Austrian Penal Code, s. 3(2), of Art. 58
Director of Public Prosecutions Act 1983, s. 5, 6, 6(1)(k), 15, 21
Extradition Act 1870 (Imp), (33 & 34 Vict. C 52), s. 26
Constitution Act 1982 (Can.), Pt. 1, s. 11
Extradition Act 1988, ss. 2, 3, 5, 6, 7, 7(a), (b), 10(1), (a), (3), (3)(b), 11(1), 12(1), (1)(b), (2), (3), 15, 16, (1), (2), (a)(ii), (2)(b), (3), 17(1), 18, 19, (2)(a), (b), (c), (d), (3)(a), 3(b), (4), (7), (9), (10), 21(1), (2), (3), (6)(d), 22, 22(1), (2), (3), 3(a), (5), (3)(a), (3)(b), (3)(d), (4), (5), 23-27, 34(2), 40-44, 152
Extradition (Foreign States) Act 1966, ss. 4(1), 6
Extradition (Foreign States) Amendment Act 1985
Extradition Amendment Act 1990, s. 4, (2)
Extradition Regulations, No. 280 of 1988, (24 November 1988)
Extradition (Repeal and Consequential Provisions) Act 1988, s. 4
Extradition (Republic of Austria) Regulations, No. 287 of 1988 (24 November 1988), regs. 3, 4
Federal Court Rules, O. 6 r. 8
Foreign States Act, ss. 4(1), 4(3), 6, 16(1), 17(6)
Fugitive Offenders Act 1881 (Imp) (44 & 45 Vict c 69)
Judiciary Act 1903, s. 39B
The Constitution, s. 75(v)
Extradition (Commonwealth Countries) Act 1966, s. 4(1), Part III, 24-30, 134(2)
Mutual Assistance in Criminal Matters Act 1987
United States Constitution, Art. IV, s. 2 cl. 2

Other sources referred to:

"Extradition and Human Rights", Shearer, (1994) 68 Australian Law Journal 451 at 452
A Treatise Upon the Law of Extradition, Clarke, 2nd Edn., (1874) at 177
Legal Rights In the Canadian Charter of Rights and Freedoms, McDonald, 2nd Edn., (1989) at 407
A Treatise on Extradition and Interstate Rendition, Moore, (1891), Vol. 1, para. 290
"Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings" Semmelman, (1991) 76 Cornell Law Review 1198

For the appellants - M Rozenes QC, Director of Public Prosecutions (Commonwealth)
For the respondent - Boe and Hogan

JUDGMENT

Brennan CJ, Dawson & McHugh JJ:

On 20 January 1993, the Republic of Austria made a request in writing for the surrender of the respondent, Maria Kainhoferr, "for prosecution in Austria in respect of a number of misappropriation and malversion offences under the Austrian Penal Code". This request was, or has been taken to have been, an "extradition request" for the purposes of the Extradition Act 1988 (Cth) ("the Act").

The respondent was arrested pursuant to a warrant issued by a Magistrate and, after proceedings in which a Magistrate found that the respondent was eligible for surrender in relation to four alleged offences, she was committed to prison to await a determination by the Attorney-General whether to surrender her to the Republic of Austria in relation to those offences or to order her release. The respondent sought a review of the Magistrate's decision to commit her to prison. Though unsuccessful at first instance before White J in the Supreme Court of Queensland, she succeeded on appeal to the Full Court of the Federal Court. The Federal Court quashed the Magistrate's order and directed the Magistrate to order the release of the appellant. The Court held that the Magistrate's order could not properly have been made unless the Magistrate was satisfied, in accordance with ss. 19(2)(a) and (3)(a) of the Act, that the supporting documents furnished by the Republic of Austria provided for the arrest of the respondent as a person "accused" of the offences to which the warrant referred. The Court examined the supporting documents and found that the Magistrate could not have been properly satisfied that the appellant was "accused" of the four alleged offences and, for that reason, the appeal was allowed. The principal issue for determination on appeal to this Court is whether it was part of the Magistrate's function to determine whether the appellant was "accused" of the four alleged offences in relation to which the order committing her to prison was made.

A Brief Conspectus of the Act

Section 3 of the Act states its principal objects to be the codification of the law "relating to the extradition of persons from Australia to extradition countries and New Zealand", the facilitation of the making of requests by Australia to other countries for extradition and the enabling of Australia to carry out its obligations under extradition treaties. The Republic of Austria is an extradition country (as defined by s. 5: Extradition (Republic of Austria) Regulations, No. 287 of 1988 (24 November 1988), reg. 3). In construing the Act in conformity with its declared objects, terms which relate to the criminal procedure of other countries should not be so interpreted as to confine the reach of the Act to cases in which a step in the foreign procedure accords precisely with a step in the procedure of Australian Courts.

When an extradition country seeks the extradition of a person from Australia, it must invoke the powers of a Magistrate under s. 12(1) of the Act and of the Attorney-General under s. 16 of the Act. Under s. 12(1), an application, in statutory form, must be made to a Magistrate for the issue of a warrant for the arrest of that person. The form of application for a warrant of arrest (form 4) prescribes that an affidavit be annexed setting out information showing that the person is "an extraditable person for the purposes of that Act in relation to" the country seeking extradition (Extradition Regulations, No. 280 of 1988, (24 November 1988)). The term "extraditable person" is defined by s. 6 of the Act:

> Where:
>
> (a) either:
>
> (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country that the person is accused of having committed either before or after the commencement of this Act; or
>
> (ii) a person has been convicted of an offence or offences against the law of a country either before or after the commencement of this Act and:
>
> (A) there is an intention to impose a sentence on the person as a consequence of the conviction; or
>
> (B) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served;
>
> (b) the offence or any of the offences is an extradition offence in relation to the country; and
>
> (c) the person is believed to be outside the country;
>
> the person is, for the purposes of this Act, an extraditable person in relation to the country.

If the Magistrate is satisfied, on the basis of information given by the affidavit, that the person is an extraditable person in relation to the extradition country, the Magistrate is required to issue a warrant for the arrest of the person and to send forthwith to the Attorney-General a report of the issue of the warrant together with a copy of the affidavit (s. 12(1)(b) and (2)).

The Attorney-General's powers are enlivened by the receipt of an extradition request (s. 16(1)). The action to be taken by the Attorney-General if extradition is to proceed is the issuing of a written notice directed to a Magistrate stating that the request has been received. Section 16(2) prescribes the condition governing the Attorney-General's power to give the notice (hereafter the "s. 16 notice"). That subsection provides:

The Attorney-General shall not give the notice:

(a) unless the Attorney-General is of the opinion:

(i) that the person is an extraditable person in relation to the extradition country; and

(ii) that, if the conduct of the person constituting the extradition offence, or any of the extradition offences, for which surrender of the person is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or

(b) if the Attorney-General is of the opinion that there is an extradition objection in relation to the extradition offence, or all of the extradition offences, for which surrender of the person is sought.

The Attorney-General may receive an extradition request either before or after the person whose extradition is sought is arrested pursuant to the Magistrate's warrant. If the Attorney-General decides before the arrest not to issue a s. 16 notice, he directs the Magistrate to cancel the warrant (s. 12(3)). But if the person has been arrested under the warrant and is remanded in custody or on bail, as provided for by s. 15, and the Attorney-General decides not to issue a s. 16 notice, he directs the Magistrate to release the person from custody or discharge the recognisances on which bail was granted (s. 17(1)). Where the Attorney-General issues a s. 16 notice and the person has been arrested pursuant to the Magistrate's warrant and has been remanded either in custody or on bail, the extradition procedure follows one of two paths: either the person consents to being surrendered under s. 18 or proceedings are conducted by a Magistrate under s. 19.

Where the person consents to being surrendered and the procedure prescribed by s. 18 is followed, a warrant is issued committing that person to prison to await surrender or release pursuant to a further determination by the Attorney-General under s. 22. Where the person does not consent, he is remanded in custody or on bail pending the conduct of proceedings under s. 19 (s. 152, if the person has been remanded before the Attorney-General has decided whether or not to issue a s. 16 notice, s. 17 contains provisions which authorise that person's release if the notice is not issued within a reasonable period). The function of a Magistrate who conducts proceedings under s. 19 (hereafter a "s. 19 Magistrate") is in issue in this appeal. Section 19 provides, *inter alia*, as follows:

(1) Where:

(a) a person is on remand under s. 15;

(b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;

(c) an application is made to a Magistrate by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and

(d) the Magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;

the Magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

(a) the supporting documents in relation to the offence have been produced to the Magistrate;

(b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the Magistrate of any other documents - those documents have been produced to the Magistrate.

(c) the Magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

(d) the person does not satisfy the Magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

(3) In para. (2)(a), '**supporting documents**', in relation to an extradition offence, means:

(a) if the offence is an offence of which the person is accused - a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;

(b) if the offence is an offence of which the person has been convicted - such duly authenticated documents as provide evidence of:

(i) the conviction;

(ii) the sentence imposed or the intention to impose a sentence; and

(iii) the extent to which a sentence imposed has not been carried out; and

(c) in any case:

(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and

(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

Where the s. 19 Magistrate determines that the person is eligible for surrender to the extradition country in relation to one or more extradition offences, a warrant is issued committing the person to prison "to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5)" (s. 19(9)) - that is, surrender or release pursuant to a determination by the Attorney-General under s. 22. If the s. 19 Magistrate determines that the person is not eligible for surrender, the person is released and the Attorney-General is notified (s. 19(10)). Provision is made by s. 21 for judicial review of the s. 19 Magistrate's order. This was the provision which conferred the jurisdiction exercised by White J at first instance.

A s. 19 Magistrate must be satisfied that the conditions of jurisdiction prescribed by subsection (1) are satisfied. Then consideration must be given to the compliance of the supporting documents with the requirements of subsection (2)(a) and (b). The character of "the conduct of the person constituting the offence ... or equivalent conduct" must be ascertained under subsection (2)(c) (No question arises in this case as to the character of the conduct constituting the four offences in relation to which the Magistrate found the appellant to be eligible for surrender). And, finally, the Magistrate must decide whether the person has shown any substantial grounds for believing that there is an extradition objection in relation to the offence: subsection 2(d). The term "extradition objection" is defined by s. 7 (The definition has the effect of precluding extradition when the extradition offence is political or military in nature, when the person's race, religion, nationality or political opinion is either the reason for seeking the person's extradition or would prejudice the person's interests if he or she were extradited, or when the person has been pardoned or punished for the extradition offence in Australia or in the extradition country).

When a person has been committed to prison pursuant to a Magistrate's determination under s. 19(9), that person becomes an "eligible person" within the definition of that term in s. 22(1) and is eligible for surrender. As soon as is reasonably practicable after the eligible person's committal, the Attorney-General is required by s. 22(2) to "determine whether the person is to be

surrendered". The Attorney-General is authorised to issue a surrender warrant (or a temporary surrender warrant: s. 23) only if the conditions prescribed by s. 22(3) are satisfied. These conditions include:

> (a) the Attorney-General is satisfied that there is no extradition objection in relation to the offence;
>
> and
>
> (f) the Attorney-General, in his or her discretion, considers that the person should be surrendered in relation to the offence.

If any of the conditions prescribed by s. 22(3) is not satisfied, the Attorney-General orders the release of the person (s. 22(5)).

The Issue Whether a Person is "Accused"

No person is liable to be taken into custody under the Act unless a Magistrate is satisfied, on the basis of the information contained in the affidavit supporting the application for the arrest of that person, that the person is an extraditable person. But the power of a s. 19 Magistrate does not extend to the reviewing of the satisfaction of the original Magistrate or of the opinion of the Attorney-General as to whether the person is an extraditable person. The powers conferred by the Act, other than those conferred on a Court by s. 21, are administrative in nature. They are exercisable by different repositories in sequence, but none of them authorises the repository of a power to review the exercise of a power by another repository earlier in the sequence.

Of course, the same issue or similar issues may arise for independent determination by the respective repositories of powers where the same issue or a similar issue conditions the exercise in sequence of their respective powers. Thus, if the Attorney-General forms an opinion when considering the issue of a s. 16 notice that there is an extradition objection, he has no power to issue the notice (s. 16(2)(b); if the s. 19 Magistrate is satisfied that there are substantial grounds for believing that there is an extradition objection, the Magistrate must order the person to be released (ss. 19(2)(d) and 10(a)); and unless the Attorney-General in making a determination under s. 22 is satisfied that there is no extradition objection, he cannot issue a warrant for the person's surrender under s. 23 (s. 22(3)(a)). But the s. 19 Magistrate does not review the Attorney-General's non-formation of an opinion under s. 16; nor does the Attorney-General review the s. 19 Magistrate's state of non-satisfaction. The existence or possible existence of extradition objections fall for consideration by the Attorney-General under s. 16, by the s. 19 Magistrate and again by the Attorney-General under s. 22 but on each occasion the repository of the relevant power makes an independent determination of the issue on which the existence of that power depends.

The question whether a person is accused of having committed an offence in relation to which a warrant for the person's arrest has been issued by an extradition country is addressed by a Magistrate under s. 12(1) and by the Attorney-General under s. 16 in considering whether the person is an extraditable person. The state of mind which is formed on that issue by those officers is not reviewable by a s. 19 Magistrate. Of course, prohibition or *mandamus* may go to an officer of the Commonwealth who exercises power under the Act (s. 75(v) of the Constitution and s. 39B of the Judiciary Act 1903 (Cth). The Administrative Decisions (Judicial Review) Act 1977 (Cth) does not apply to decisions under the Extradition Act 1988: see the Administrative Decisions (Judicial Review) Act, s. 3 and Schedule 1 para. (r)) but the amenability of decisions under ss. 12(1) and 16 to judicial review does not expose those decisions to review by a Magistrate who conducts administrative proceedings under s. 19. Nor does subsection (2)(a) in conjunction with subsection (3)(a) of s. 19 make the accusation of the person whose surrender is sought a condition affecting any power conferred by that section. The s. 19 Magistrate is neither required nor authorised to determine the issue whether that person is an extraditable person.

The authority of a Magistrate to conduct proceedings under s. 19 depends on the matters specified in subsection (1) including the making of an order of remand under s. 15 and the giving of a s. 16 notice. Lacking any power to review those decisions, a s. 19 Magistrate must proceed on the footing that the order and the notice, if not invalid *ex facie*, were validly made. Treating the order of remand and the giving of the notice as valid, the s. 19 Magistrate must proceed on the footing that the person whose surrender is sought is an extraditable person and that the case falls within either para. (a)(i) or para. (a)(ii) of s. 6. It would be a curious interpretation of s. 19 to attribute to a s. 19 Magistrate the power to find that the person is not an extraditable person when the s. 19 Magistrate's authority depends on the contrary hypothesis. In the administrative sequence, that issue is committed only to the consideration of the Magistrate under s. 12(1) and the Attorney-General under s. 16.

The function of the s. 19 Magistrate under subsection 2(a) of s. 19 is concerned solely with the correspondence between the "supporting documents in relation to the offence" produced to the Magistrate and the description of "supporting documents" in subsection (3). The "offence" referred to in subsection (2)(a) is the offence referred to in subsection (1), namely, "the extradition offence or extradition offences for which surrender of the person is sought by the extradition country". Given that the person is an extraditable person, "the offence" in s. 19(2)(a) must be taken to be either an offence "that the person is accused of having committed" or an offence of which the "person has been convicted". The introductory words of subsection (3)(a) and (b) merely direct the s. 19 Magistrate to the relevant description to be applied to the supporting documents in the case of the particular extraditable person who is the subject of the s. 19 proceedings. The relevant direction is obtained

by the s. 19 Magistrate by reference to whatever material is produced. If that material does not include supporting documents that answer one of the categories of documents described in subsection (3), the requirement of subsection 2(a) is not satisfied; if there be supporting documents that answer the description in one of those categories, the requirement of subsection (2)(a) is satisfied.

In the present case, the only issue for determination under s. 19(2)(a) was whether the document produced was a duly authenticated warrant or copy warrant issued by the Republic of Austria for the arrest of the respondent for an extradition offence for which the surrender of the respondent was sought by the Republic of Austria. That issue did not require a finding as to whether the respondent was a person "accused".

It follows that the Federal Court was in error in considerating whether the s. 19 Magistrate could properly have found that the respondent had been "accused" of any of the four offences in relation to which the Magistrate held the respondent to be eligible for surrender. It is unnecessary to decide whether the Federal Court was itself in error in the meaning which it attributed to "accused" or in the effect which it attributed to the warrant for the arrest of the respondent issued by the Salzburg State Court in the Republic of Austria. It is sufficient to say that, in considering whether a person is an extraditable person under s. 6(a)(i) of the Act, it is necessary to bear in mind the statutory object of enabling Australia to carry out its obligations under extradition treaties with countries that adopt a variety of criminal procedures different from our own.

The appeal must be allowed and the order of the Federal Court (other than the order as to costs) must be set aside. The matter be remitted to the Federal Court to determine issues raised on appeal and cross-appeal to that Court which have not yet been determined. The parties are agreed that, if that be the result of this appeal, a consequential order be made in the following terms:

That until the Federal Court orders otherwise:

(a) The respondent not seek the return of her passport from the Australian Federal Police and not apply for any other passport or travel document;

(b) the respondent not attend any port of international departure; and

(c) the respondent reside at 66 Gordon Street, Hawthorne, Brisbane or such other address as may be notified in writing to the Director of Public Prosecutions, 48 hours prior to the taking up of such residence.

In accordance with the condition on which special leave to appeal was granted in this matter, the orders for costs in the Courts below will not be disturbed. The parties are at liberty to make submissions in writing within 14 days as to the costs of the appeal to this Court.

Toohey J:

I agree with the reasons for judgment of Brennan CJ, Dawson and McHugh JJ and with the orders they propose. There is however one aspect warranting further comment, namely, the scope for judicial review of decisions made under the Extradition Act 1988 (Cth) ("the Act").

As their Honours conclude, in reaching a decision as to a person's eligibility for surrender under s. 19 of the Act, a Magistrate is not required to determine whether the person is an "extraditable person" within s. 6 of the Act. A determination of that question only arises when, as a first step in the extradition process, a Magistrate is called upon to issue a provisional arrest warrant under s. 12 and when the Attorney-General has given notice pursuant to s. 16 that an extradition request from an extradition country has been received.

While I agree with their Honours' construction of the Act, a consequence is that there is little scope for judicial review of the question whether a person is an extraditable person. Only the Magistrate's decision under s. 19 as to eligibility for surrender is expressly reviewable under the Act (see s. 21). The decision to issue provisional arrest warrant under s. 12 is not expressed to be reviewable. Decisions under the Act are included in Schedule 1 to the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act") among those decisions to which the ADJR Act does not apply.

The respondent argued that only if she was "accused" could the Magistrate determine that the requirements of s. 19(3)(a) had been met and that therefore whether she was "accused" was necessarily a matter to be determined by the Magistrate. But, as their Honours show, this is to read too much into s. 19. The introductory words in s. 19(3)(a) and (b) are classificatory rather than having an operative effect. The requirement that a person is an extraditable person, involving as it does a conclusion that the person is "accused" of having committed an offence against the law of a country, is spelled out in ss. 12 and 16 but not in s. 19. In those former sections no provision is made for judicial review and as already noted the ADJR Act has no application to a decision made under those sections. The Magistrate's function under s. 12 is limited in so far as he or she is required to be satisfied "on the basis of information given by affidavit" that the person is an extraditable person (s. 12(1)(b). In the explanatory memorandum to the Extradition Bill, it is said: "Pursuant to this clause a Magistrate is **required** to issue a warrant if he is **informed** by affidavit that the person is an extraditable person" (emphasis added)).

It has been said that a feature of the Act is "a substantial shift away from judicial review of the extradition process towards the exercise of unreviewable executive discretion." (Shearer, "*Extradition and Human Rights*", (1994) 68 Australian Law Journal 451 at 452). The comment has force.

These observations say nothing as to s. 39B of the Judiciary Act 1903 (Cth) which includes in the original jurisdiction of the Federal Court "any matter in which a writ of *mandamus* or prohibition or an injunction is sought against an officer or officers of the Commonwealth". A State Magistrate exercising jurisdiction under the Act does not in any event answer the description of an officer of the Commonwealth (*Trimbole v. Dugan* [1984] 3 FCR 324; 57 ALR 75). In *Harris v. Attorney-General (Cth)* ([1994] 52 FCR 386; 125 ALR 36) s. 39B was invoked to challenge the issue of a notice by the Attorney-General under s. 16(1) of the Act. The relief sought was declaratory, coupled with an injunction to restrain further action upon the notice. Prohibition is only available where jurisdictional error has occurred (*Craig v. South Australia* [1995] 69 ALJR 873; 131 ALR 595). And, as the Full Court of the Federal Court observed in *Harris* ([1994] 522 FCR 386 at 401; 125 ALR 36 at 49):

> Of course, investment with jurisdiction to hear a dispute is one thing; the grant of discretionary prerogative relief including declaratory relief if appropriate, is another.

The immediate question in this appeal is whether it was necessary for the Magistrate to determine whether the respondent had been "accused" of an offence against the law of Austria. For the reasons given by Brennan CJ, Dawson and McHugh JJ, this was not a necessary step in the exercise of power under s. 19. The scope for challenging a decision of the Magistrate under s. 19 is therefore very limited. No other challenge to the exercise of power was mounted before this Court.

Gummow J:

This appeal raises issues of construction of the Extradition Act 1988 (Cth) ("the Act") and the Extradition (Republic of Austria) Regulations made under the Act ("the Regulations") (Statutory Rules 1988, No. 287). The Regulations declare that the Republic of Austria ("Austria"), the second appellant, is an "extradition country" for the purposes of the Act (reg. 3). They also provide (reg. 4) that the Act applies in relation to Austria subject to the Treaty between Australia and Austria which came into force on 6 February 1975 ("the Treaty"), as amended by a Protocol which came into force on 1 February 1987 ("the Protocol").

Part II of the Act (ss. 12-27) deals with extradition from Australia, Pt III (ss. 28-39) makes special provision for extradition to New Zealand and Pt IV (ss. 40-44) deals with extradition to Australia from other countries. This appeal raises issues under Pt II.

The Proceedings and The Parties

The respondent was born in Austria in 1953 and is an Austrian national. She is a person whose surrender under the Act is sought by Austria. The proceeding comes to this Court pursuant to a grant of special leave to appeal against orders made by the Full Court of the Federal Court of Australia on 14 September 1994. The Full Court allowed an appeal against an order of the Supreme Court of Queensland made 10 December 1993. The Supreme Court confirmed an order made by a Magistrate under s. 19(9) of the Act on 1 November 1993. The Magistrate found that the respondent was eligible for surrender in respect of some, but not all, of the offences for which her surrender was sought by Austria.

One of the orders of the Full Court, in allowing the appeal, was that the Magistrate be directed to order that the respondent be released. The respondent presently is at liberty, subject to the observance of certain conditions, pursuant to a consent order made by a Justice of this Court.

The Full Court did not consider the other grounds of appeal before it, particularly that as to lack of dual criminality. Nor did the Full Court deal with a cross-appeal and an objection to the competency of that cross-appeal. The parties agree that, if the appeal to this Court succeeds, it will be necessary to remit the matter to the Full Court for determination of the remaining issues.

The Magistrate was exercising his functions pursuant to arrangements made under s. 46 of the Act the Governor-General and the Governor of the State of Queensland. It has been held in the Federal Court that, in performing functions under s. 19, the Magistrate does not exercise the judicial power of the Commonwealth (*Schlieske v. Federal Republic of Germany (No. 2)* [1987] 76 ALR 417 at 422; *Zoeller v. Republic of Germany* [1989] 23 FCR 282 at 290; *Todhunter v. USA* [1995] 129 ALR 331 at 339). This was accepted by both sides in the present appeal.

Decisions under the Act are not decisions to which the Administrative Decisions (Judicial Review) Act 1977 (Cth) applies. This follows from Schedule 1 and the definition in s. 3(1) of that statute of the phrase "decision to which this Act applies". However s. 21 of the Act provides that, where a Magistrate of a State makes an order consequent upon a determination that a person is eligible for surrender, that person may apply for what is identified as a "review of the order" to the Federal Court or to the Supreme Court of the relevant State, in this case Queensland. On that "review" (and on appeal to the Full Court of the Federal Court and this Court), regard was to be had only to the material that was before the Magistrate (s. 21(6)(d)). The Supreme Court was empowered by s. 21(2) to make an order confirming the order of the Magistrate or to quash that order and to direct the Magistrate to order the release of the respondent. As I have indicated, the Supreme Court confirmed the order of the Magistrate.

It will be noted that, in a case such as the present where the Magistrate made an order adverse to the person whose surrender is sought, s. 21(1) provides that it is that person who may apply to the Court for a review of that order. In the present case, the application by the present respondent to the Supreme Court joined as respondents not only Austria but the Director of Public Prosecutions ("the Director"). No application was made under O. 6 r. 8 of the Federal Court Rules for an order adding the Director as a necessary party.

Section 21(3) of the Act states:

> The person or the extradition country, whether or not the person or country was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.

However, upon the appeal to the Full Court, the respondent again joined the Director and Austria as the respondents. They in turn, having been unsuccessful in the Full Court, have both brought the present appeal to this Court.

Section 21 of the Act plainly provides for two parties to proceedings instituted under that provision, namely the person whose surrender is sought and the extradition country. It is not immediately apparent that the Director is a proper or competent party as the first appellant.

Upon the matter being raised in argument before the Court, Counsel referred to provisions of the Director of Public Prosecutions Act 1983 (Cth) ("the DPP Act"). The Director holds an office created by s. 5 of the DPP Act. One of the functions of the Director specified in s. 6(1) is "to appear in proceedings under the Extradition Act 1988 or the Mutual Assistance in Criminal Matters Act 1987" (para. (k)). Section 15 of the DPP Act provides that, in proceedings of a kind referred to s. 6(1)(k), the Director "may appear in person" or may be "represented" by Counsel or solicitor or by various other persons including a member of the staff of the Office of the Director (which also is established by s. 5). Section 6(1)(k) speaks of the Director appearing in proceedings not of the Director instituting, taking over or carrying on proceedings as is the case of various prosecutions identified in other paragraphs of s. 6(1).

No objection was taken by the respondent to the institution of the appeal to this Court in this form, no doubt bearing in mind that this is an apparent consequence of the form in which the respondent initially constituted her application for review to the Supreme Court. Thus, it is inappropriate to express any concluded view on the matter. Nevertheless, in the light of the terms of s. 21 of the Act and ss. 6 and 15 of the DPP Act, there is a serious question whether the Director may institute or carry on any proceeding identified in s. 21 of the Act, or properly be joined as respondent to such a proceeding.

The Full Court Decision

The Full Court allowed the appeal on the footing that, on the material before the Magistrate, the Magistrate could not properly have been satisfied as provided in s. 19 that there had been produced to him a duly authenticated warrant issued by Austria for the arrest of the respondent as a person "accused" of the extradition offences in relation to which surrender was sought. The Full Court decided that "the overriding impression" was that in Austria the matter had not proceeded "beyond the investigation state" ([1994] 52 FCR 341 at 359). In essence, the decision turned upon the construction of s. 19 and the meaning of the phrase "the person is accused" in the particular context in which it appears in s. 19. This context is the definition in s. 19(3) of the "supporting documents" to be produced to the Magistrate.

The phrase is also found in the definition of "extraditable person" in s. 6 of the Act. Section 6 states:

> Where:
>
> (a) either:
>
> (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country **that the person is accused of having committed** either before or after the commencement of this Act; or
>
> (ii) a person has been convicted of an offence or offences against the law of a country either before or after the commencement of this Act and:
>
> (A) there is an intention to impose a sentence on the person as a consequence of the conviction; or
>
> (B) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served;
>
> (b) the offence or any of the offenses is an extradition offence in relation to the country; and
>
> (c) the person is believed to be outside the country;
>
> the person is, for the purposes of this Act, an extraditable person in relation to the country. (Emphasis added)

Section 6(b) uses the term "extradition offence". That, in turn, is relevantly defined in s. 5 as an offence for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months. Thus, to reach a view as to whether a particular individual is an "extraditable person" requires consideration of whether there is an extraditable offence (para. (b)), as well as of accusation or conviction (para. (a)).

The term "extraditable person" supplies one criterion as to which, under s. 12 the Magistrate is to be satisfied before the issue of a warrant for the arrest of the person sought, and, under s. 16, the Attorney-General must form an opinion if he is to give the notice of which that section speaks.

Further, Art. 11 of the Treaty, as amended by the Protocol, identifies documents by which the request for extradition is to be accompanied and states in Art. 11(2)(a):

> if the person is accused or has been convicted in his absence of an offence - by a warrant for the arrest or a copy of the warrant for arrest of the person, a statement of each offence for which extradition is sought and a statement of the acts or omissions which are alleged against the fugitive in respect of each offence.

Before the Full Court, the respondent had sought an adjournment for the presentation of additional evidence to advance a case that she was not an "extraditable person" within the meaning of s. 6 because she was not a person "accused", as required by s. 6, of having committed offences against the law of Australia. The Full Court refused the adjournment principally on the ground that, by reason of s. 21(6)(d) of the Act, it was required to have regard only to the material which had been before the Magistrate ([1994] 52 FCR 341 at 356).

However, as I have indicated, the Full Court entertained, and accepted, a submission based upon a particular construction of s. 19 of the Act. This was that the respondent had not been eligible for surrender because the Magistrate could not properly have been satisfied, as he had to be, that the supporting documents placed before him included a duly authenticated warrant for the arrest of the appellant which disclosed that she was a person "accused" of the offences referred to in that warrant.

Upon the appeal, the respondent supported the Full Court decision in her favour with the submission that (1) the Act does not provide for extradition of persons merely required for the purposes of investigation, (2) if the respondent were required by the warrant of arrest for this purpose, she would not yet be "accused" in the sense required by the Act, and (3) this possibility had not been sufficiently excluded for the Magistrate to have been satisfied under s. 19 that she was eligible for surrender. However, the appellants take a wider view of what is involved in "accusation". They also challenge proposition (3) and submit that it was no function of the Magistrate under s. 19, and thus not open on "review" under s. 21, to consider whether the respondent was an "accused".

It is to this latter submission that I should first turn. In considering this aspect of the case, it will be necessary to refer in greater detail to the scheme of Pt II of the Act.

The Function of the Magistrate under s. 19

The appellants submit that the function of the Magistrate under s. 19 is to decide whether or not the person is "eligible for surrender" under s. 19(1) and, in particular, the Magistrate does not decide whether the person is an "extraditable person" as defined in s. 6. The appellants contrast the function of the Magistrate under s. 19 with that of the Attorney-General and the Magistrate at the anterior stages provided for in ss. 16 and 12 respectively. Section 12(1) provides for the issue by a Magistrate of a warrant if the Magistrate is satisfied, on the basis of information given by affidavit, that the person is an "extraditable person" in relation to the extradition country. Again, under s. 16(2), the Attorney-General shall not give notice stating that an extradition request has been received unless the Attorney-General is of opinion that the person is an "extraditable person in relation to the extradition country".

In order to assess these submissions, it is appropriate first to refer to the various stages in extradition proceedings under the Act. In *Harris v. Attorney-General* (Cth) ([1994] 52 FCR 386 at 389, followed in *Todhunter v. USA* [1995] 129 ALR 331 at 333), the Full Federal Court said:

> The Act contemplates four stages in extradition proceedings as follows: (1) Commencement; (2) Remand; (3) Determination by a Magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s. 12(1) or by the giving of a notice under s. 16(1). Once arrested, the person is required by s. 15 to be taken before a Magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s. 19. Where a person is on remand under s. 15 and the Attorney-General has given a notice under s. 16(1), provision is made under s. 19 for a Magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the Magistrate, provision is made by s. 22 for the Attorney-General to decide whether the person is to be surrendered.

With regard to the circumstances of the present matter, the following points may be noted concerning these procedures. Where the Attorney-General receives an extradition request from an extradition country in relation to a person, the Attorney-General may, by notice in writing, state that the request has been received (s. 16(1)). The notice is to be in statutory form, for which provision is made in the Extradition Regulations (Statutory Rules 1988, No. 280). Section 16(2) states:

> The Attorney-General shall not give the notice:
>
> (a) unless the Attorney-General is of the opinion:
>
> (i) that the person is an extraditable person in relation to the extradition country; and

(ii) that, if the conduct of the person constituting the extradition offence, or any of the extradition offences, for which surrender of the person is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or

(b) if the Attorney-General is of the opinion that there is an extradition objection in relation to the extradition offence, or all of the extradition offences, for which surrender of the person is sought.

In the present case, a notice in relation to the respondent was given by the Attorney-General under s. 16(1) on 11 February 1993. The notice stated that an extradition request from Austria, an extradition country, in relation to the respondent had been received. The notice contained the following recital:

Whereas:

(a) in respect of an extradition request dated 20 January 1993 from The Republic of Austria, an extradition country, in relation to Maria Kainhofer I am of the opinion:

(i) that Maria Kainhofer is an extraditable person for the purposes of the Extradition Act 1988 in relation to that country; and

(ii) that, if the conduct of Maria Kainhofer constituting the following extradition offences, namely aggravated fraud (eight counts), misappropriation of a motor car (one count), perjury (one count), attempting to commit fraudulent bankruptcy (one count) and credit card fraud (one count) for which surrender of Maria Kainhofer is sought, had taken place in Australia at the time at which the extradition request was received, the conduct would have constituted extradition offences in relation to Australia; and

(b) I am not of the opinion that there is an extradition objection in relation to the following extradition offences for which surrender of Maria Kainhofer is sought: aggravated fraud (eight counts), misappropriation of a motor car (one count), perjury (one count), attempting to commit fraudulent bankruptcy (one count) and credit card fraud (one count).

It should be noted that in *Harris v. Attorney-General* ([1993] 45 FCR 11; affd [1994] 52 FCR 386), the Federal Court entertained an application under s. 39B of the Judiciary Act 1903 (Cth) for injunctive relief to restrain the taking of action upon a notice issued under s. 16(1). No such application was made by the respondent at the corresponding stage of the extradition process in the present case.

Section 12 of the Act deals with the issue of provisional arrest warrants. A Magistrate to whom an application is made, in the statutory form, on behalf of an extradition country, for the issue of such a warrant shall issue a warrant

if the Magistrate is satisfied "on the basis of information given by affidavit, that the person is an extraditable person in relation to the extradition country". In the case of the respondent, on 17 March 1993 a Magistrate issued a provisional arrest warrant under s. 12(1) which was stated to authorise and request all police officers within the meaning of the Act to arrest the respondent and to bring her as soon as practicable before a Magistrate in the State in which she was arrested to be dealt with according to law. The warrant recited that an application had been made to the Magistrate on behalf of Austria, an extradition country, for the issue of a warrant and that the Magistrate was satisfied "on the basis of information given by ... affidavit" that the respondent "is an extraditable person for the purposes of the Extradition Act 1988 in relation to that extradition country".

The respondent was arrested pursuant to this warrant on 18 March 1993 and remanded on bail pursuant to s. 15(2) of the Act.

If (1) a person is on remand after arrest on a provisional arrest warrant, (2) a notice has been given by the Attorney-General under s. 16, (3) application has been made to the Magistrate for proceedings to be conducted in relation to that person under s. 19, and (4) the Magistrate considers there has been reasonable time for preparation by the extradition country and the person for the conduct of the proceedings, then the Magistrate is required by s. 19 to conduct proceedings the object of which is the determination of whether that person is eligible for surrender in relation to the extradition offences for which surrender is sought.

As has been indicated, if the Magistrate determines that the person is eligible for surrender, then the taking of the final steps in the process falls to the Attorney-General. Those steps may lead to the release of the person (s. 22(5)) or to the issue by the Attorney-General of a warrant for the surrender of the person to the extradition country (s. 23).

Accordingly, when dealing with a question as to the sufficiency of supporting materials provided by the extradition country, it is important to ask that question in relation to each of the distinct steps in the extradition process. Some supporting material may be relevant to one, but not others of those stages. Thus, the task of the Attorney-General under s. 22, for example, differs significantly from that of the Magistrate under s. 19.

It is appropriate now to set out the text of s. 19:

> (1) Where:
>
> (a) a person is on remand under s. 15;
>
> (b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;

(c) an application is made to a Magistrate by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and

(d) the Magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;

the Magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

(a) the supporting documents in relation to the offence have been produced to the Magistrate.

(b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the Magistrate of any other documents - those documents have been produced to the Magistrate.

(c) the Magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

(d) the person does not satisfy the Magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

(3) In para. (2)(a), '**supporting documents**', in relation to an extradition offence, means:

(a) if the offence is an offence of which the person is accused - a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant;

(b) if the offence is an offence of which the person has been convicted - such duly authenticated documents as provide evidence of:

(i) the conviction;

(ii) the sentence imposed or the intention to impose a sentence; and

(iii) the extent to which a sentence imposed has not been carried out; and

(c) in any case:

(i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence; and

(ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

(4) Where, in the proceedings:

(a) a document or documents containing a deficiency or deficiencies of relevance to the proceedings is or are produced; and

(b) the Magistrate considers the deficiency or deficiencies to be of a minor nature;

the Magistrate shall adjourn the proceedings for such period as the Magistrate considers reasonable to allow the deficiency or deficiencies to be remedied.

(5) In the proceedings, the person to whom the proceedings relate is not entitled to adduce, and the Magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought.

(6) Subject to subsection (5), any document that is duly authenticated is admissible in the proceedings.

(7) A document that is sought by or on behalf of an extradition country to be admitted in the proceedings is duly authenticated for the purposes of this section if:

(a) it purports to be signed or certified by a Judge, Magistrate or officer in or of the extradition country; and

(b) it purports to be aunthenticated by the oath or affirmation of a witness or to be sealed with an official or public seal;

(i) in any case - of the extradition country or of a Minister, Department of State or Department or officer of the Government, of the extradition country; or

(ii) where the extradition country is a colony, territory or protectorate - of the person administering the Government of that country or of any person administering a Department of the Government of that country.

(8) Nothing in subsection (6) prevents the proof of any matter or the admission of any document in the proceeding in accordance with any other law of the Commonwealth or any law of a State or Territory.

(9) Where, in the proceedings, the Magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence or one or more of the extradition offences, the Magistrate shall:

(a) by warrant in the statutory form, order that the person be committed to prison to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under subsection 22(5);

(b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under subsection 21(1); and

(c) record in writing the extradition offence or extradition offences in relation to which the Magistrate has determined that the person is eligible for surrender and make a copy of the record available to the person and the Attorney-General.

(10) Where, in the proceedings, the Magistrate determines that the person is not, in relation to any extradition offence, eligible for surrender to the extradition country seeking surrender, the Magistrate shall:

(a) order that the person be released; and

(b) advise the Attorney-General in writing of the order and of the Magistrate's reasons for determining that the person is not eligible for surrender.

It will be apparent that, within the meaning of s. 19, the person is eligible for surrender only if the Magistrate is satisfied of two matters, those in s. 19(2)(c) and (d). The first of these is concerned with dual criminality and the second with the absence of an extradition objection. In respect of both these matters, the Attorney-General had been required to form an opinion before issuing a notice under s. 16.

Both the Attorney-General and the Magistrate, when respectively giving notice under s. 16 and issuing a provisional arrest warrant under s. 12, were obliged to consider whether the person was an extraditable person in relation to the extradition country. That requirement, spelled out in the text of ss. 12 and 16, is not repeated in s. 19(2).

There must also be produced to the Magistrate "supporting documents in relation to the offence" (s. 19(2)(a)) and such other documents as required to satisfy any limitation, condition, exception or qualification subject to which the Act applies in relation to the extradition country (s. 19(2)(b)); nothing turns upon para. (b) for the purposes of this appeal. The term used in s. 19(2)(a), "supporting documents", has the meaning spelled out in s. 19(3). This identifies in paras. (a), (b) and (c) respectively three classes of documents which were "duly authenticated". A document which is sought by and on behalf of the extradition country to be admitted in the proceedings will be "duly authenticated" if it complies with s. 19(7). The Magistrate may adjourn the proceedings in the circumstances prescribed in s. 19(4) to allow remedy of deficiency in documents produced.

In this sense, the power of the Magistrate to determine whether the person is eligible for surrender depends upon the production of "supporting documents" which comprise documents which are "duly authenticated" (cf *Riley v. The Commonwealth* [1985] 159 CLR 1 at 9, 21). In addition to being "duly authenticated", what other classification applies to "supporting documents" in any given case? The answer is provided by s. 19(3). Attention should first be directed to para. (c) thereof. This states that "in any case", that is to say, in any case in which the Magistrate is conducting proceedings under s. 19 to determine eligibility for surrender, there must be a duly authenticated statement in writing setting out a description of and the penalty applicable in respect of the offence, together with a duly authenticated statement in writing setting out "the conduct constituting the offence". The phrase "the conduct ... constituting the offence in relation to the extradition country" appears in s. 19(2)(c) as an element in the consideration of dual criminality. Questions of the penalty applicable will be relevant to the inquiry under s. 19(2)(d), the existence of an extradition objection.

What further supporting documents are required? The answer depends upon the classification of the extradition offence established by paras. (a) and (b) of s. 19(3). If the offence is one for which the person has been convicted, then there must be provided the duly authenticated documents set out in para. (b). If, on the other hand, the offence is one for which the person is "accused", then what is required is the duly authenticated arrest warrant specified in para. (a).

If the person was neither accused nor convicted, then all that would be required as supporting documents would be those identified in para. (c), as required "in any case". Accordingly, even if it were the case, as the respondent contends, that the opening phrase of para. (a), "if the offence is an offence of which the person is accused", presented an issue for determination by the Magistrate as a step in deciding whether there had been produced the "supporting documents", the result would not avail the respondent. The result, in the present case, would be that, if the respondent fell within neither para. (a) nor para. (b), all that would be required would be the documents specified in para. (c). Either the phrase "in any case" in para. (c) identifies the classifications of offence in paras. (a) or (b) or includes some other class of case. If the latter, and if the offences in respect of the respondent do not fall within paras. (a) or (b), then para. (c) was satisfied and therefore the necessary "supporting documents" were produced.

However, whilst even the construction advanced for the respondent has this unpalatable consequence for her, in my view, that is not how the matter stands. There is a preferable construction. Nevertheless, this also does not favour the respondent's case.

The definition of "extraditable person" in s. 6 requires that either the person has been convicted, as described, or that there is an arrest warrant in relation to the commission of an offence against the law of the extradition country of which the person is "accused". If the person in question falls within neither category, then that person cannot be an "extraditable person". The Attorney-General is not to give notice under s. 16 unless of opinion that the person is an "extraditable person", nor is the Magistrate to issue a provisional arrest warrant under s. 12 unless so satisfied. That the person be an extraditable person is not specified in s. 19(2) as a necessary condition of eligibility for surrender and the making of an order by the Magistrate under s. 19(9) committing the person to prison to await surrender.

The classification in s. 19(3) of that which is required for the necessary "supporting documents" assumes that extradition is sought either in respect of an offence of which the person is accused or in respect of an offence of which the person has been convicted. It does not proceed on the footing that there is a further category of offences in respect of which the person is neither accused nor convicted.

It is for the Magistrate to determine that the necessary duly authenticated documents are produced and there may be debate as to what, in a particular case, amounts to due authentication within the meaning of s. 19(7). There may also be debate in a particular case as to whether the warrant is "for the arrest of the person for the (extradition) offence".

Again, though it would be unlikely, there may be a dispute that one rather than the other of paras. (a) and (b) applied, the contention being that the offence was one in respect of which the person had been convicted rather than one in respect of which the person was still accused. Where the person had been convicted *in absentia*, then the person would be deemed to have been accused rather than to have been convicted. This follows from the terms of s. 10(1) which could render applicable para. (a) rather than para. (b) of s. 19(3).

What is not involved, nor permitted, in the classification of the "supporting documents" produced to the Magistrate is an inquiry before the Magistrate as to whether the offences are offences of which the person is neither convicted nor accused.

For these reasons, in my view the Full Court fell into error in determining the appeal on the ground that the Magistrate could not properly have been satisfied that the supporting documents included a duly authenticated warrant for the arrest of the respondent which disclosed that she was a person "accused" of the offences referred to in the warrant.

The submissions for the appellants on this branch of the case thus should be accepted.

That is sufficient to dispose of the appeal to this Court and to bring about remission of the matter to the Federal Court for disposition of the balance of the proceeding before it.

Nevertheless, in the course of argument to this Court, submissions were made as to the meaning of the term "accused", not only in what was said to be the particular operation of s. 19 relied upon by the respondent, but also in the definition of s. 6 of "extraditable person". Further, an understanding of the various steps called for by the legislation, leading to the proceeding under s. 19, assists the proper construction of s. 19. Accordingly, I should deal with the submissions on the broader question involving accusation for the purposes of s. 6.

Accusation and Extraditable Persons

The Full Court dealt with the matter as follows (*Kainhofer v. DPP* [1994] 52 FCR 341 at 358-359):

> Neither the Act nor the Treaty, however, defines the circumstances in which a person is to be regarded as being 'accused' of the offence or offences in respect of which surrender is sought. In the jurisprudence of this country, one would not normally speak of a person as a person who is 'accused' of a criminal offence in the sense in which that expression is used in the Act unless legal proceedings for the imposition of a penalty in respect of the offence have been commenced by the laying before a Magistrate or other appropriate official of an information or complaint alleging the commission of the offence or by the presentation to a Court of an indictment alleging such commission or unless the person has been formally charged with the offence before an appropriate official following upon his arrest. *That statement may not be exhaustive but, in any event, it would not be sufficient to establish that a person was 'accused' of an offence to show only that a complaint had been made to the police alleging the commission of the offence or that the police, or other investigating body, were conducting inquiries to determine whether there was evidence of the commission of the offence sufficient to warrant the person being 'accused' of the offence in the sense mentioned.* (Emphasis added)

The Full Court considered the English translation of the warrant which had been provided by Austria and concluded ([1994] 52 FCR 341 at 359):

> [T]he author of the document regarded the initiation of preliminary investigations in respect of the offences as equivalent to the institution of criminal proceedings in which the (respondent) is charged with having committed those offences. Further material by way of explanation would be necessary before the conclusion could be reached that the statements referred to are to be taken to mean that the (respondent) is 'accused' in the relevant sense of the specified offences. No such material was placed before the Magistrate.

Part II of the Act strikes a balance between the interests of the extradition country in retrieving those whose return it seeks in respect of offences against its laws, those of Australia in upholding its dominion over those presently on its territory and those of the alleged extraditable persons. The striking of such a balance will involve a comparison between the respective legal systems involved.

Such a comparison is indicated by the requirements that the extradition country give a speciality assurance (ss. 22(3)(d), 22(4)), that the extradition offence not be a political offence (ss. 5, 7(a) and (b), 16(2)(b), 22(3)(a)), and that, on surrender to the extradition country, the person will not be subjected to torture (s. 22(3)(b)).

There is also the requirement of dual criminality (ss. 10(3), 16(2)(a)(ii), 19(2)(c)) and the difficult notion of "equivalent conduct". This stipulation, in particular, calls for a comparison between the criminal law of Australia, or the relevant part of Australia, and of the extradition country (*Riley v. The Commonwealth* [1985] 159 CLR 1 at 17-19). If the requirement otherwise is satisfied, then there is to be disregarded any difference between "the denomination or categorisation" of offences under the respective laws (s. 10(3)(b)).

On this branch of the case, the appellants submit to this Court that, had the matter been open to the Magistrate, it would have been open to him to conclude from the contents of the warrant that the respondent was a person "accused" in the sense given that term by the Full Court. Further, and this is the submission of general importance, the appellants point out that the content of arrest warrants can vary considerably from one extradition country to another and that the Act is designed to operate in respect of diverse systems of criminal procedure. They submit that the true question was whether, not having been convicted, nevertheless the respondent was wanted by the relevant authorities of the extradition country for prosecution in respect of extraditable offences.

The phrase "a person accused" has a long history of legislation of this type in Australia and the United Kingdom. Section 4(1) of the Extradition (Foreign States) Act 1966 (Cth) ("the Foreign States Act") included a definition:

> 'fugitive' means a person accused of an extradition crime that is alleged to have been committed, or convicted of an extradition crime that was committed, at a place in a foreign state or within the jurisdiction of, or of a part of, a foreign state.

The Extradition (Commonwealth Countries) Act 1966 (Cth) ("the Commonwealth Countries Act") contained in s. 4(1) a definition of "fugitive" with no material differences. Both the Foreign States Act and the Commonwealth Countries Act were repealed by s. 4 of the Extradition (Repeal and Consequential Provisions) Act 1988 (Cth), with effect upon the

commencement of the Act. In turn, s. 6 of the Foreign States Act had excluded the operation in Australia of the Extradition Act 1870 (Imp) (33 & 34 Vict c 52) ("the 1870 Act") and s. 6 of the Commonwealth Countries Act had excluded the operation in Australia of the Fugitive Offenders Act 1881 (Imp) (44 & 45 Vict c 69) ("the 1881 Act").

Section 26 of the 1870 Act had included a provision:

> The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of her Majesty's dominions; and the term 'fugitive criminal of a foreign state' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state.

The 1881 Act (s. 2) operated in respect of "a person accused of having committed an offence".

The requirement of production of a foreign warrant was included in the Foreign States Act (ss. 4(1), 16(1), 17(6)). Its predecessor, the 1870 Act, did not require that the requisition by the foreign state be accompanied by a warrant of arrest issued in that state, but it was usual for the executive to require "some *prima facie* evidence of guilt" (Clarke, *A Treatise Upon the Law of Extradition*, 2nd Edn., (1874) at 177) and in some cases the treaty stipulated production of a warrant of arrest "or other equivalent judicial document" (The extradition treaty of 1876 between Great Britain and France so provided; see *R v. Governor of Brixton Prison* [1911] 2 KB 82 at 83 where the text is set out).

Part III (ss. 24-30) of the Commonwealth Countries Act dealt with extradition to and from New Zealand. Section 27 empowered a Magistrate before whom a person was brought under that Part, in certain circumstances, to order the release of that person. One relevant circumstance existed where the Magistrate was satisfied of "the accusation against the person not having been made in good faith or in the interests of justice" (para. (b)). A provision to the same effect now is made, again in relation to New Zealand, in s. 34(2) of the Act.

The phrase "the accusation against the person" in s. 27 was construed by the Full Court of the Federal Court in *Narain v. DPP* ([1987] 15 FCR 411). It held that "accusation" referred to the formal proceedings by which the prosecution was commenced in New Zealand, not to the complaint which had been made to the police there. Wilcox and Jackson JJ said ([1987] 15 FCR 411 at 421-422):

> The word 'accusation' is not a legal term of art. It is an appropriate use of language to say that a victim 'accuses' his or her assailant of an offence. But it is doubtful that the word 'accusation' was used in that sense in s. 27(a)(ii). The subparagraph requires consideration, in an appropriate case, of the question whether an 'accusation' has been made 'in the interests of justice'. This wording

suggests a formal proceeding for the vindication of justice rather than an informal complaint.

> **The non-technical term 'accusation' was probably chosen so as to include all of the various procedures - information, charge, etc. - which might be followed in New Zealand or; in s. 16, in any declared country.** It follows from this conclusion that, in the present case, the two 'accusations' were the informations laid by Detective Sergeant Currie. The question, then, is whether those informations were laid in good faith. (Emphasis added)

A further example of legislative awareness as to the need to accommodate the procedures of foreign jurisdictions is now found in s. 10(1) of the Act itself. I have referred to s. 10 on the first branch of the appeal. It states:

> Where a person has been convicted in the person's absence of an offence against the law of an extradition country, whether or not the conviction is a final conviction, then, for the purposes of this Act, the person is deemed not to have been convicted of that offence but is deemed to be accused of that offence.

This provision had been preceded by s. 4(3) of the Foreign States Act. This had stated (in the form it took after the Extradition (Foreign States) Amendment Act 1985 (Cth)):

> Where a person has been convicted in the absence of the person of an offence against the law of, or of a part of, a foreign state, whether or not the conviction is a final conviction, then, for the purposes of this Act, the person shall be deemed not to have been convicted of that offence but shall be deemed to be accused of that offence.

The Commonwealth Countries Act contained, in s. 4(3), a provision which did not materially differ. Earlier, s. 26 of the 1870 Act had included a provision:

> The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy.

Such provisions which classify as persons accused rather than convicted those who have been convicted in their absence, for contumacy, reflect an awareness of a species of conviction under foreign systems of law which does not correspond to that applying in common law countries (*Athanassiadis v. Govt of Greece* [1971] AC 282 at 295; *Wiest v. DPP* [1988] 23 FCR 472 at 492-493, 510-511).

As was pointed out in *Narain* ([1987] 15 FCR 411 at 421), in the common law, the term "accused" is not a legal term of art. It may be used in legislation with purely domestic concerns so as to encompass terms such as "charge", "indict", "impeach", "arraign", "incriminate", as well as to refer to the laying of an information in a private prosecution (see *Fraser v. The Queen (No. 2)* [1985] 1 NSWLR 680 at 689-690). But it would not readily be understood as including suspicion by prosecuting authorities but without prosecution (see

Stirland v. Director of Public Prosecutions [1944] AC 315 at 323-324). Much would depend upon the particular statutory or constitutional context. Where what is in issue is a constitutional guarantee then the term may be expected to be used broadly.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused" shall enjoy the right to a speedy and public trial and other rights. Thus, the right to a speedy trial arises only when a person becomes "accused". This has been treated as meaning the point at which either a formal indictment or information has been returned against the person, or when the person becomes subject to actual restraints on personal liberty imposed by arrest, whichever first occurs (*State of Hawaii v. Almeida* [1973] 509 P 2d 549 at 551).

Section 11 of the Canadian Charter of Rights and Freedoms (Constitution Act 1982 (Can), Pt I) confers various rights upon a person "charged with an offence". It has been suggested that the phrase "charged with an offence" may not be limited to accusation in Court by formal complaint, information or indictment and may include an earlier step, such as the service of a parking ticket (*R. v. Heit* [1984] 3 WWR 614 at 619-620; McDonald, *Legal Rights In the Canadian Charter of Rights and Freedoms*, 2nd Edn., (1989) at 407; cf *Kodellas v. Saskatchewan Human Rights Commission* [1987] 2 WWR 195 at 204-209).

The provision made by the United States Constitution for extradition between the States of the Union should briefly be noted. Article IV, s. 2 cl. 2 states:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

The crucial phrase is "A person charged". This term has been construed as requiring that an indictment has been found or an affidavit has been made before a Magistrate alleging commission of the offence in question (*Reener v. Reener* [1935] 181 A 191). However, a convict, the term of whose sentence has not expired, is still "charged" within the meaning of the constitutional provision (*Ex parte Foster* [1936] 61 P 2d 37; *Ex parte Burnett* [1943] 144 P 2d 126), even if on parole (*Wynsma v. Leach* [1975] 536 P 2d 817).

The need to construe extradition legislation in a fashion apt to accommodate criminal procedure of extradition countries which operates in a different fashion to that generally applicable in common law jurisdictions has long been recognised. The point may be made with reference to nineteenth century authorities. They were concerned with two presently relevant matters. The first was whether in the extradition country it was necessary for a warrant for arrest to have been issued. The second was whether proceedings had been instituted against the person whose extradition was sought.

The position under the 1870 Act in this respect accorded with that under earlier British legislation. One example is provided by the English decision *In re Tivnan* ([1864] 5B & S 645 [122 ER 971]; 10 LT (NS) 499). The Imperial Statute 6 & 7 Vict c 76 (passed in 1843 and repealed by the 1870 Act) implemented the Webster-Ashburton Treaty made in 1842 between Britain and the United States (Further legislative provision in respect of this treaty was made by 8 & 9 Vict c 120 [1845]. Before 1870, Britain had arrangements for extradition only with France, Denmark and the United States: *Rees v. Secretary of State for the Home Department* [1986] AC 937 at 953 per Lord Mackay of Clashfern). Section 1 of the 1843 statute was enlivened by a requisition made by the United States in pursuance of the treaty for "the delivery up of any person charged with" various crimes including piracy committed within the jurisdiction of the United States. During the Civil War, a merchant ship of the United States, bound for New York, was seized by three persons acting on behalf of the Confederate Government. Later, having disposed of the ship and cargo, these three persons were found at Liverpool and, upon a requisition from the United States Ambassador, a warrant was issued for their apprehension under s. 1 of the statute. Upon the return of a writ of *habeas corpus*, it was contended that they were not "charged", within the meaning of the legislation, because they had not been accused before some tribunal of the United States. The Court of Queen's Bench held that, whilst it would be a salutary rule for the executive to say to the claiming power "before we act on your requisition we must see that there is charge which has received a judicial inception in your country", that was not required by the statute in question.

The same position obtained in the United States, as appears from the work by Moore, *A Treatise on Extradition and Interstate Rendition* ((1891), Vol. 1, para. 290. Authorities cited for that proposition include *In re Farez* [1870] 8 Fed Cas 1007 and *In re Thomas* [1874] 23 Fed Cas 927). It was said there:

> Unless it be required by treaty, it is not necessary that it should appear that a warrant of arrest has been issued or judicial proceedings instituted in the foreign country.

In *Muller's* Case ([1863] 17 Fed Cas 975), Saxony was the State seeking extradition from the United States. The District Court referred to the significance of the Webster-Ashburton Treaty with Great Britain, saying ([1863] 17 Fed Cas 975 at 975):

> Of the treaties now in force on the subject of extradition, the earliest is that of 1842, with Great Britain. [8 Stat. 576.] Its form has, in general, been followed in the others. An occasional recurrence to it will prevent their phraseology from being applied with too much latitude. But an adherence to it so close as to exclude reasonable cosmopolitan interpretation of them should be not less avoided as too narrow.

What was meant by "reasonable cosmopolitan interpretation" then was illustrated as follows ([1863] 17 Fed Cas 975 at 975-976):

> How, and how far, the crime in question must have been the subject of a charge or public accusation, in the country whose Government asks the extradition, does not appear distinctly in the treaties, or in any opinion of the Supreme Court of the United States. The subject has been discussed elsewhere, but not satisfactorily. Its difficulties are, in part, removed by the acts of congress of 1848 ... and 1860 ... (The text of the statutes of 1848 and 1860 is set out in Moore, *A Treatise on Extradition and Interstate Rendition*, (1891), Vol. 2 at 1162-1165. The legislation invested certain Courts with jurisdiction to issue warrants for the apprehension of persons "charged" in a complaint made under oath or affirmation, to take the evidence of criminality put forward, and to determine whether it be deemed sufficient "to sustain the charge under the provisions of the proper treaty of convention"; evidence would be received for this purpose if so authenticated as to entitle it to be received for similar purposes by the tribunals of the foreign country "from which the accused party shall have escaped". See also Semmelman, "*Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*", (1991) 76 Cornell Law Review 1198 at 1208-1210). The argument that there must have been some authorized public accusation of equivalent effect with what is here, and in England, called an indictment, cannot prevail. To adopt such a rule, would interpolate in the treaties a condition requiring what might, in some countries, be considered objectionable as a partial prejudication of guilt in cases to be afterwards tried. The treaty with Great Britain certainly requires no previous indictment or presentment. Between the United States and that country, such a condition, if intended, would have been expressed. In *Kaine's* case ([1852] 55 US 111) the only process had been a warrant issued in Ireland under an *ex parte* deposition. The warrant had not been executed, service of it having been successfully evaded. This warrant and a copy of the deposition, certified and attested under the second section of the Act of 1848, appear to have been thought sufficient, together, to satisfy the requirements of the treaty. ... *So far as concerns mere accusation in the country whose Government makes the application, any proceeding in that country under which evidence has been, or might lawfully be taken there, with a view either to a future criminal prosecution, or to deciding whether to institute one, satisfies the requirements of the treaty.* (Emphasis added)

How then does the present case stand? It is necessary first to refer further to the Regulations.

Section 11(1) of the Act provides that regulations may state that the Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty. Further, as a result of amendments to s. 11 by s. 4 of the Extradition Amendment Act 1990 (Cth) ("the 1990 Act"), for the purposes of s. 11(1), the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty may be expressed in the form that this Act applies to the country concerned subject to that treaty. Section 4 of the 1990 Act applies to the country concerned subject to that treaty. Section

4 of the 1990 Act commenced on 22 October 1990 whilst the Regulations were gazetted on 30 November 1988. However, Regulations are to be treated as if the relevant changes to s. 11 of the Act, brought about by s. 4 of the 1990 Act, had been effective at the date of commencement of the Regulations. This follows from s. 4(2) of the 1990 Act. Hence, the Treaty by dint of the Regulations and s. 11 has a significant effect upon the operation of the Act in the present case.

Regulation 4 provides:

> The Act applies in relation to the Republic of Austria subject to the Treaty between Australia and the Republic of Austria concerning extradition that came into force on 6 February 1975 (being the Treaty a copy of the English text of which is set out in Schedule 1) as amended by the Protocol between Australia and the Republic of Austria amending that Treaty that came into force on 1 February 1987 (being the Protocol a copy of the English text of which is set out in Schedule 2).

Article 1 of the Treaty as amended by the Protocol states:

> Each contracting party agrees to extradite to the other, in accordance with the provisions of this Treaty, any **persons who are wanted for prosecution** or the imposition or enforcement of a sentence in the requesting State for one or more of the offences referred to in Art. 3. (Emphasis added).

The Treaty is to be interpreted in the light of the object and purpose disclosed by Art. 1 (*The Commonwealth v. Tasmania. The Tasmanian Dam* Case [1983] 158 CLR 1 at 222-223; *Thiel v. Federal Commissioner of Taxation* [1990] 171 CLR 338 at 349, 356).

Whatever otherwise might have been the effect of Pt II of the Act, where extradition is sought from Australia to Austria, it operates in respect of persons wanted by Austria "for prosecution" or the imposition or enforcement of a sentence. The procedures laid down in Pt II are to be understood as directed to the making by the Attorney-General of a determination for the surrender of the extraditable person for detention in respect of a sentence, or trial in respect of an offence. The term "accused" in the definition of "extraditable person" in s. 6 is, in the case of Austria, to be read accordingly, even if that would not otherwise be so.

However, in any event, I would not construe the term "accused" as including that which is described in the last sentence in the extract set out above from *Muller's* case ([1863] 17 Fed Cas 975 at 976), namely, any proceeding in Austria in which evidence has been or might lawfully be taken with a view either to a future criminal prosecution or to making a decision as to whether to institute a criminal prosecution.

First, the requirement in ss. 6 and 19 for there to have been in force or issued by the extradition country a warrant for the arrest of the person in question marks the modern legislation off from that considered in the nineteenth century authorities to which I have referred. The course of legislative history which I have outlined indicates an increasing specificity in the procedures of the country requesting extradition. To treat as "accused" a person against whom there were on foot merely inquiries preliminary to the institution of a prosecution would be contrary to that trend.

Secondly, in respect of aliens present in Australia whose surrender is sought by extradition processes, considerations of personal liberty are at stake. In a classic judgment upon extradition law delivered in the Supreme Court of the United States, the point was made (*In re Kaine* [1852] 55 US 111 at 150-151 per Nelson J. See also *The Case of the Hottentot Venus* [1810] 13 East 195 [104 ER 344]; *Elk v. Wilkins* [1884] 112 US 94 at 108):

> [U]nder our system of laws and principles of Government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them.

Hence, *habeas corpus* is available to an alien who has been wrongfully arrested, even by orders of the Crown (*Ex parte Lo Pak* [1888] 9 NSWR 221 at 236-240, 244-248, 249; *Johnstone v. Pedler* [1921] 2 AC 262 at 273; *R. v. Carter; Ex parte Kisch* [1934] 52 CLR 221 at 227). It is reasonable to expect that the legislature would express clearly an intention to authorise the executive surrender of such persons, not necessarily for trial, but rather to facilitate inquiries by the proper authorities in the extradition country as to whether a prosecution should be instituted (*Re Bolton; Ex parte Beane* [1987] 162 CLR 514 at 523, 529-530).

Thirdly, the term "extraditable person", as defined in s. 6, is expressed as applying "for the purposes of this Act", that is to say, not only for the purposes of extradition from Australia (Pt II, ss. 12-27), but also extradition to Australia from other countries (Pt IV, ss. 40-44). This suggests that the phrase in the definition "the person is accused" has, with due allowance for the differing legal systems that may be involved, a broadly similar operation. Section 43 of the Act empowers the Attorney-General to authorise the taking of evidence in Australia for use in any proceedings for the surrender to Australia of a person suspected by the Attorney-General of being an "extraditable person" in relation to Australia. Section 40 states that a request by Australia for the surrender of a person from a country, other than New Zealand, in relation to an offence against a law of Australia "of which the person is accused or of which the person has been convicted", shall be made only by or with the authority of the Attorney-General. Further, where a person is surrendered to Australia in relation to an offence against a law of Australia "of which the

person is accused or of which the person has been convicted", that person shall be brought into Australia and "delivered to the appropriate authorities to be dealt with according to law" (s. 41).

It would be an unlikely construction of these provisions that the references therein to persons accused of an offence against a law of Australia were treated as extending to cases merely where inquiries were on foot to decide whether to institute a prosecution.

Further, the notion of reciprocity between Australia and other countries is, on the face of the statute, fundamental to the legislative scheme. A principal object of the Act, stated in s. 3, is to enable Australia to carry out its obligations under extradition treaties and another is to facilitate the making of extradition requests by Australia. The Act in numerous provisions (for example, ss. 6, 7, 10, 40, 41) distinguishes between those accused or prosecuted and those convicted. One would expect a clear indication in the statutory text if, by reference to "accusation", Australia was to give, as a matter not only of degree but of kind, greater recognition to the criminal processes of other countries than that which it could ever seek for itself.

On the other hand, I would not accept the proposition that there must be an authorised public accusation of equivalent effect to what in common law systems would be treated as an indictment or the laying of an information. Care must be taken to allow, within the limits mentioned earlier in these reasons, what in the United States was called a "reasonable cosmopolitan interpretation". In particular, differences between denomination or categorisation of procedures should not be given too great a weight. The fundamental question is whether the person whose extradition is sought under Pt II is one in respect of whom there has been taken by the competent authorities in the extradition country a decision to invoke the operation of the criminal law by the taking of whatever steps are necessary to initiate what might fairly be described as a prosecution.

Was the Respondent "Accused"?

It is now appropriate to turn to the request for extradition in the present case. It was dated 20 January 1993 and presented by the Embassy of Austria in Canberra. The request stated that, in accordance with the Treaty:

> the competent Austrian Authorities request the arrest and subsequent extradition of the Austrian national Maria Kainhofer **for prosecution** in Austria in respect of a number of misappropriation and malversion offences under the Austrian Penal Code. (Emphasis added)

The form of the request followed Art. 1 of the Treaty as amended by the Protocol. I have referred to the significance of Art. 1 for the operation of the Act in the present case.

Article 11(2)(a) required that such a request for extradition be accompanied "if the person is accused or has been convicted in his absence of an offence" by, among other documents, "a warrant for the arrest ... of the person". The enclosed warrant of arrest was issued on 29 September 1992 under the seal of the Salzburg State Court by a Judge of that Court, Dr. Hellfried Shuller. It states that the respondent:

> is to be taken into custody on the strong suspicion of having attempted to commit negligent bankruptcy pursuant to §§156 and 15 of the Austrian Penal Code, of having given false evidence in a Court of law pursuant to §288, s. 2 of the Austrian Penal Code, of having committed aggravated fraud (partially attempted and partially accomplished) pursuant to §§146 and 147, ss. 2 and 3, and 15 of the Austrian Penal Code, and of having committed misappropriation pursuant to §133, ss. 1 and 2 of the Austrian Penal Code. Her apprehension is sought due to the risk of escape and the perpetration of further crimes pursuant to §175, s. 1, subparas. 2 and 4 of the Austrian Code of Criminal Procedure.

Subparagraphs (2) and (4) of this provision of the Austrian Code of Criminal Procedure are further dealt with later in the warrant as follows:

> The grounds for arrest pursuant to §175, s. 1 subpara. 2 of the Austrian Penal Code apply since the defendant party was remanded into custody by order of the Salzburg State Court on 10 July 1990 from which she was released on 8 August 1990 with directions not to flee, not to hide and to report to the police once a week. She did not follow these directions. Her present whereabouts are unknown which leads to the conclusion that the defendant has tried to evade justice by fleeing.
>
> The grounds for arrest due to perpetration of further crimes pursuant to §175, s. 1 subpara. 4 of the Austrian Penal Code apply since the defendant party is charged with having committed numerous crimes against property and the danger of committing further tortious acts to finance her livelihood is evident.

The text of Art. 175 of the Code of Criminal Procedure is also set out. The relevant portions thereof are as follows:

> 175 Code of Criminal Procedure
>
> Section 1: The examining Magistrate may order a person suspected of having committed a felony or misdemeanour to be taken into temporary custody without prior summons;
>
> ...
>
> 2. if the suspect is at large or hiding or if, due to certain facts, there is a risk that he will flee or hide to avoid the impending putative punishment or other grounds;
>
> ...

4. if due to certain facts, it can be assumed that he would commit an offence directed at the same object of legal protection as the crime with which he is charged, or if it can be assumed that he would perpetrate the attempted or threatened criminal act with which [he] is charged." (Emphasis added)

It is with these provisions in mind that one turns to what are identified in the balance of the warrant of arrest as "grounds". Under that heading, it is stated that, based on previous investigations, the respondent "is strongly suspected of having committed the following offences". Counsel for the respondent fixed upon the phrase "strongly suspected" but that has to be read both against the terms of Art. 175 and the text of the particular counts which follow. Of these counts, the Magistrate determined that the respondent was eligible for surrender on four grounds only. These are counts numbered 2, 3(a), 3(g) and 4.

The next of these counts, with explanatory material, is as follows:

2. Giving false evidence in a Court of law pursuant to §288, s. 2 of the Austrian Penal Code by swearing a false oath of disclosure on 20 January 1988 at the Radstadt District Court, by swearing not to possess items with a retention of title, although items were found in her possession that were obviously subject to a reservation of title.

An oath of disclosure is a measure taken during Austrian execution proceedings. The obligated party can be requested to render such an oath if no attached objects were found on its premises. In this case, the obligated party, duly sworn, must itemize its entire property including those objects in its custody. The defendant made a false deposition and confirmed the same with her signature.

The defendant admits that the record is false, however, maintains that she made no false statement. The witness, the honourable Dr Peter Masser, was heard in this regard **and confirms the charges**. ...

3. Committing aggravated fraud (partially attempted and partially accomplished) pursuant to §§15, 146 and 147, ss. 2 and 3 of the Austrian Penal Code, by intending to unjustly enrich herself or a third party through the actions of the deceived party:

(a) By deceiving the authorised agent of Dietrich Edv-Programme in Villach by inducing him to deliver two computers and programs on 31 May 1989 and on 21 October 1989 by pretending to be solvent and willing to pay for said items;

This resulted in damages in the amount of ATS 38.400,--. The Court order to extend preliminary investigations to include the suspicion of fraud was issued on 25 May 1990. The orders for the computer processing equipment were placed on 31 May 1989 and 21 October 1989.

...

(g) By fraudulently obtaining prior turnover tax in the amount of ATS 240.000,-- by submitting false documents to the revenue office in St. Johann in Pongau in 1989 and by submitting false invoices of the non-existent company 'Sonnenoase Waikiki' to the revenue office in Linz from December 1989 to April 1990, thereby fraudulently effecting a tax credit entry in the amount of ATS5.211.002,--, whereby ATS2.090.370,-- remained an attempt;

This represents a case of attempted aggravated fraud pursuant of §147, s. 1, subparagraph 1 of the Austrian Penal Code since the fraudulent attempt was made by means of submitting false documents.

The Court order to extend preliminary investigations to include the submission of false documents to the revenue office in St Johann in Pongau was issued on 19 March 1990; to include the submission of false documents to the revenue office in Linz on 6 June 1990 ...

...

The defendant admits her guilt regarding the facts and circumstances [at] (a) ..., however pleads not guilty to the intention to defraud, since numerous forced realizations were pending at the time of concluding the individual agreements and, since did not dispose of sufficient financial means, she therefore could not expect to be able to pay for the debts incurred.

...

The defendant pleads guilty of having forged the documents [at] (g) to obtain a turnover tax refund. The Court has the false invoices in hand. The year was forged in several cases. This was confirmed by copies of the invoices provided by the firms issuing the invoices. Maria Kainhofer is charged with having fraudulently obtained a refund for taxes, although she was not even taxable. Pursuant to the Austrian statutes, a tax evasion represents a tax reduction and as such assumes that the person was subject to taxation. A fraudulent enticement through non-taxable persons is therefore considered as fraud and not as a tax evasion.

...

4. Committing misappropriation pursuant to §133, ss. 1 and 2 of the Austrian Penal Code by concluding a lease agreement with Osterreichische Leasing GmbH on 17 October 1985 for an Alpha Spider 2.0 motor vehicle, licence plate S 465.784; said agreement was terminated by the Osterreichische Leasing GmbH as of 29 June 1987 due to default in payment, but the vehicle was not returned by the defendant party, who therefore unlawfully appropriated property entrusted to her to her own use and benefit, with the intent to unjustly enrich herself of a third party.

> This motor vehicle could only be returned to the owner, the Austrian Leasing-Ges.m.b.H., by means of Court confiscation since the defendant refused to surrender said property. (Emphasis added)

In all these grounds there is reference to subsection (2) of s. 3 of Art. 58 of the Austrian Penal Code. In the case of grounds 2, 3(a) and 4, there is a statement that the offence in question is not subject to the period of limitation contained in Art. 58. Direct reliance is placed upon the provision in Art. 58 that the time "during which legal proceedings for the offence are still pending against the defendant at Court" is not included in the limitation period.

The Full Court of the Federal Court concluded its examination of the warrant by stating that "the overriding impression is that the matter has not yet proceeded beyond the investigation stage" ([1994] 52 FCR 341 at 359). The Court preceded that statement by saying ([1994] 52 FCR 341 at 359):

> That the warrant of arrest provides for the [respondent] to be taken into custody 'on the strong suspicion' of having committed the specified offences clearly suggests that her presence in the Republic of Austria is required in furtherance of the investigations being conducted by the appropriate authorities in that country rather than to answer criminal charges of which she is presently 'accused' in the sense to which we have referred.

I reach a different conclusion. One must begin with the extradition request dated 20 January 1993. This requests the arrest and subsequent extradition of the respondent "for prosecution in Austria" in respect of a number of misappropriation and malversion offences under the Austrian Penal Code. The warrant indicates that the respondent was remanded in custody by order of the Salzburg State Court on 10 July 1990 but that she was released on 8 August 1990 on conditions which were not observed. The warrant of arrest was issued pursuant to Art. 175 of the Austrian Code of Criminal Procedure. Reliance is placed upon subsections (2) and (4) of s. 1. Subsection (2) speaks of impending punishment and subsection (4) speaks of crimes with which the person in question is charged.

These references colour the meaning to be given, in the translation, to the term "suspected" in s. 1 of Art. 175. As Counsel for the appellants submitted, one can suspect someone in a manner which is merely investigative or preliminary or one can suspect a person in a manner which is the product of a more advanced state of affairs, in particular, accusation by the laying of charges.

Of the particular counts which were upheld by the Magistrate, the respondent is said to have admitted certain elements of what are stated as the charges against her whilst the charges are said to have been confirmed by a witness. The respondent is stated as admitting her guilt regarding the facts and circumstances in ground 3(a) but to deny an intention to defraud. As to ground

3(g), the respondent is said to plead guilty to having forged certain documents to obtain a turnover tax refund and to be charged with having fraudulently obtained such a refund.

In my view, a fair reading of these materials indicates that the respondent is wanted for prosecution on charges including the four grounds accepted by the Magistrate. It is on that footing that, under Austrian law, there is the necessary suspicion to found the issue of the warrant of arrest by the Salzburg State Court dated 29 September 1992. It follows that, within the meaning of s. 6 of the Act, the respondent is a person in respect of whom there is in force a warrant for arrest in relation to offences against the law of Austria which she is accused of having committed.

It is unnecessary to determine at what earlier point in the procedures under the Austrian system the respondent might have become an "extraditable person" within the meaning of s. 6 of the Act.

Conclusion

The appeal should be allowed. The orders made by the Full Court of the Federal Court on 14 September 1994 (save as to costs) should be set aside. The matter should be remitted to the Federal Court for determination on the remaining issues on the appeal and cross-appeal from the Supreme Court of Queensland. Until the Federal Court orders otherwise, the respondent (a) will not seek the return of her passport from the Australian Federal Police and will not apply for any other passport or travel document; (b) will not attend any port of international departure; and (c) will reside at 66 Gordon Street, Hawthorne, Brisbane, or such other address as she notifies the Director of Public Prosecutions in writing 48 hours before taking up such residence. Any submissions as to the costs of the appeal to this Court may be made in writing within 14 days of delivery of judgment.